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Position Paper Roundtable Discussion on the Situation in Gaza, 28.05.2025

Obligations under the Genocide Convention with respect to the situation of the Palestinian civilian population in Gaza

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1. Introduction

This position paper addresses the question of the obligations of third states under the Genocide Convention in relation to a risk of genocide committed by Israel against the Palestinian civilian population in Gaza. The position paper concludes that the Netherlands should have become aware of the risk of genocide relatively soon after the start of the conflict in Gaza, thereby creating an obligation to prevent/end genocide. We also explain how we conclude that the risk of genocide has since become genocide. Finally, we outline the consequences for the Netherlands in terms of concrete actions.

2. The obligation to prevent genocide

Article I of the 1948 Genocide Convention, binding on all parties, including Israel and the Netherlands, stipulates that states undertake to prevent and punish genocide. The official
The title of the treaty is therefore *the Convention on the **Prevention** and Punishment of the Crime of Genocide.* The argument that states should wait for a judicial decision that genocide has already occurred is contrary to the Genocide Convention. The most authoritative judicial body regarding the interpretation of international law, the International Court of Justice (ICJ), has ruled in

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The *Bosnia v. Serbia* case ruled in paragraph 182 that a state's obligation to prevent genocide, and the corresponding obligation to act, **arises at the moment the state becomes aware of the existence of a serious risk that genocide will be committed;** a judicial determination is not required. From that moment on, the state, provided it can influence those suspected of preparing genocide, has the obligation to use those means if circumstances permit.

3. Recognition of – risk of – genocide by the Government and the House of Representatives

An important question for you as a House and for the government is under what circumstances and with what information a country may or must form a position with regard to a (threatening) Genocide. **It is, as already mentioned, a misconception that a judicial decision must be awaited.** In many cases, there is no judicial body with jurisdiction to establish genocide. And even if a court does have jurisdiction to rule on genocide—for example, in Israel's case, because South Africa has appealed to the ICJ and neither state has made a reservation regarding the ICJ's jurisdiction—the decision on whether genocide has been committed will only come well after the genocide has occurred. Waiting for this is contrary to the obligation to prevent and/or end genocide.

The Advisory Committee on International Law Issues (CAVV) explained in its advisory report " *The Use of the Term Genocide by Politicians* " that "[t]he judgments of states on international law issues are inherent in the system of international law" and that it is, in principle, up to states "to pass judgment on acts of other states or other persons that are relevant to international law. This implies that parliaments are also not hampered by a rule that only the courts can rule on genocide or crimes against humanity." [4] To this
The CAVV adds two considerations when Parliament should exercise restraint in assessing a risk of genocide. First, in the absence of sufficiently reliably established facts. This does not apply in the case of Gaza, as there is an abundance of reliably established facts from, among others, the International Court of Justice, the International Criminal Court, the United Nations, and specialized NGOs. Second, the CAVV notes that there is a preference "for alignment with international assessments where possible, but a national assessment need not be postponed for this reason."5

We concur with this view. Restraint is important, but when sufficiently reliably established facts point to a risk of genocide, it is up to states (and also parliaments) to implement their obligations to prevent, end, and punish genocide. More on this later.

It is also clearly not Dutch policy to make the recognition of genocide dependent solely on judicial decisions. Then-Minister of Justice, Yesilgoz, said - less than two years ago

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[3] ICJ, Bosnia v. Serbia, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Hercegovina v. Serbia and Montenegro)* (2007), para. 182, see 091-20070226-JUD-01-00-EN.pdf.
[4] CAVV, *The Use of the Term Genocide by Politicians,* p. 7, see 28. The Use of the Term Genocide by Politicians | Advisory Committee | Advisory Committee on International Law Issues.
[5] CAVV, *The Use of the Term Genocide by Politicians,* p. 8, see 28. The Use of the Term Genocide by Politicians | Advisory Committee on International Law Issues.

years ago – regarding the recognition of the genocide against the Yezidis, the following: *For the Dutch government, when recognizing genocide, rulings by international courts and criminal courts, unambiguous conclusions resulting from scientific research, and UN findings are leading. The government believes that sufficient facts have been established to conclude that IS has most likely committed genocide.* (June 14, 2023, Parliamentary Document 27925, no. 939)

In short, recognition of genocide by a state depends on the totality of known facts and circumstances and their assessment by authoritative bodies and scholars. In the case of Gaza and the treatment of the Palestinian population there, there are several relevant rulings by the ICJ and the International Criminal Court (ICC), a growing number of sufficiently unambiguous conclusions from scientific research, and also findings by UN bodies and committees that point to genocide. The question therefore arises whether the government's principle regarding the recognition of genocides is being applied uniformly and consistently – why is genocide being established for ISIS-Yazidis, but not yet for Israeli-Palestinians in Gaza? This distinction is all the more remarkable since, in the case of the genocide established by Minister Yesilgoz against Yazidis, no international court rulings were available from which the (risk of) genocide could be inferred, while this is the case for the Palestinians in Gaza. Moreover, we agree with Yesilgoz that the treatment of the Yazidis by ISIS should be considered genocide.

4. The moment the risk of genocide in Gaza was established by the court

The moment the Dutch state became aware of the serious risk of genocide being committed in Gaza was **at the latest** on January 26, 2024, when the ICJ ruled that it was plausible that the rights of the Palestinians under the Genocide Convention were being violated. In addition, Israel was then ordered by the ICJ to do everything in its power to stop and prevent the commission of genocide by the military and other state actors, to punish those guilty of incitement to genocide, to allow humanitarian aid to enter immediately and effectively, and to prevent the destruction of evidence. In doing so, the ICJ cited numerous sources it considered authoritative in establishing this risk of genocide. At this early stage in the proceedings between South Africa and other states and Israel, the ICJ can only draw this conclusion: a judgment on whether genocide has actually been committed will only be made considerably later, after all parties have had the opportunity to present their views in detail. Following the interim judgment of January 26, 2024, the ICJ issued two additional judgments (March 28, 2024, and May 24, 2024), finding that Israel repeatedly violated the aforementioned obligations, in which it ordered Israel, in increasingly urgent terms, to comply with its obligations under the Genocide Convention.

We wish to emphasize that the ICJ's judgment of January 26, 2024, is an unavoidable "trigger" for the Netherlands and other states party to the Genocide Convention; it is the last possible moment at which it should have become clear to the Netherlands and other states that the risk of genocide in Gaza existed. The Netherlands had already been reminded of its obligations to prevent genocide in Gaza. Five weeks after October 7, 2023, in preparation for the Round table discussion dated **16 November 2023,** De Hoon wrote in her position paper to the House Committee on Foreign Affairs: *“Several speeches by Israeli leaders using dehumanizing language, humanitarian blockades that make living conditions very dire, and the number of attacks targeting civilian infrastructure and densely populated areas are indications that*

There may be a legitimate concern about this [genocide, MdH]. This obligates other states, based on the obligation to prevent genocide as described in Article 1 of the Genocide Convention, to urge Israel not to pursue this path (further). (Attached as Appendix 1)

5. Gaza and the qualification of genocide under international law

Since the interim judgment of the ICJ of 26 January 2024 – in which the risk of genocide was undeniably signalled by the most authoritative international judicial body –
Much time has passed. Almost a year and a half later, the situation in Gaza has demonstrably deteriorated, as evidenced by all the facts established since then by independent organizations and experts.
Meanwhile, a growing number of scholars, international organizations, and NGOs have concluded, based on the available facts, that Israel's treatment of the Palestinian civilian population in Gaza now qualifies as genocide. It is difficult to determine precisely when the situation shifted from a risk of genocide to genocide, but we are convinced that this shift has already occurred. As early as September 2024, a UN committee concluded that Israel's policy in Gaza bore the characteristics of genocide: " *The developments in this report lead the Special Committee to conclude that Israel's policies and practices during the reporting period are consistent with the characteristics of genocide."*
[6]

In a thorough factual and legal analysis, Amnesty International also concluded in December 2024 that Israel is committing genocide in Gaza. In approximately 300 pages, AI provides an account of the methodology used in its own investigation, which included hearings of more than 200 witnesses and giving Israel the opportunity to respond to an initial version, an overview of the relevant facts, and a legal analysis of the content and scope of genocide. Based on its investigation, AI concludes that Israel is committing genocide against the Palestinian population in Gaza and draws the following conclusions based on the legal framework established by case law:

- The Palestinian population is a protected group under the Genocide Convention;
- The unlawful killing of now more than 50,000 Palestinian civilians and the imposition of living conditions aimed at the destruction (the withholding of humanitarian aid) of the civilian population in Gaza is more than sufficient to speak of a partial destruction of the Palestinian population;

- Israel's aim for such destruction can be deduced from several statements made by politicians, from past policies (discrimination and apartheid against Palestinians in Israel) and from policies pursued during the war in Gaza;
- The intent to destroy a group protected by the Genocide Convention may coexist with any other objectives of Israel's military operations and policies, such as achieving military advantage or destroying Hamas.

We found no deficiencies in the AI report and fully share the analysis and conclusions. All in all, there is sufficient reason – bearing in mind the government's principle regarding
establishing genocides as was practiced against the Yezidis for some years – at the very least to judge that

[6] Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories, UNGA Doc A/79/363, para. 69, see: https://docs.un.org/en/A/79/363.
[7] Amnesty International, *You feel like you are subhuman – Israel's genocide against Palestinians in Gaza,* see https://www.amnesty.nl/content/uploads/2024/12/Gaza-genocide-report.pdf?x17069.

sufficient facts have been established to state that Israel has most likely committed and is committing genocide in Gaza.

The American and authoritative human rights organization Human Rights Watch also judged that Israel is guilty of genocide in Gaza.8

In Appendix 2, we provide a further explanation of the legal assessment of genocide and its application to Gaza.

6. Crimes against humanity and war crimes

While we conclude that Israel is guilty of genocide, we also wish to express our concern about the excessive focus on genocide, as the mere commission of war crimes and/or crimes against humanity should not suggest that these are less serious.
Even without the label of genocide, the international community has a duty—through lawful means—to prevent and end war crimes and crimes against humanity in Gaza. Regarding the latter category, crimes against humanity, we refer to Article 3 of the draft convention on crimes against humanity, which also includes an explicit obligation to prevent crimes against humanity. Although this requires further investigation, it cannot be ruled out that this obligation is already part of customary international law.

7. What does the obligation to prevent genocide entail for the Netherlands?

The obligations under the Genocide Convention relevant to this position paper boil down to a) not committing genocide (or being complicit in it), and b) taking sufficient steps to prevent or end genocide. The ICJ's ruling in *Bosnia v. Serbia* is particularly relevant to the interpretation of the content and scope of these obligations. In it, the ICJ confirmed that these obligations not to commit genocide, not to be complicit in genocide, and to prevent genocide are not limited to one's own territory: *The substantive obligations arising from Articles I and III are not, on their face, limited by territory. They apply to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligations in question.*

In the *Bosnia v. Serbia* case, the ICJ further established that the obligation to prevent genocide also necessarily implies that States have an obligation not to commit or be complicit in genocide.11 Complicity in genocide requires that there be an intentional contribution to the genocide in Gaza, in the knowledge that this contribution constitutes the commission of the genocide.

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[8] Extermination and Acts of Genocide: Israel Deliberately Depriving Palestinians in Gaza of Water, December 19, 2024, available at: https://www.hrw.org/report/2024/12/19/extermination-and-acts-genocide/israel-deliberately-depriving-palestinians-gaza

9 Draft articles on Prevention and Punishment of Crimes Against Humanity, 2019, Adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10). See art. 3 paragraph 2: 'Each State undertakes to prevent and to punish crimes against humanity, which are crimes under international law, whether or not committed in time of armed conflict.'

[10] ICJ, Bosnia v. Serbia, para. 183.
[11] ICJ, Bosnia v. Serbia, para. 166-167.

Genocide is facilitated. In our view, the supply of weapons to Israel used for its genocidal policy qualifies as complicity. As far as the Netherlands is concerned, this does not currently appear to be the case.12

The ICJ's criteria regarding the content of the obligation to prevent genocide – and to end it after it has possibly begun – are indeed relevant.

The ICJ has repeatedly explained that all states parties to the Genocide Convention are obligated, when they are (or should be) aware of a serious risk of genocide, to use **"all means reasonably available to them"** to prevent genocide as much as possible.13 This is a best efforts obligation aimed at ending the genocide as soon as possible.14 That this is a best efforts obligation, and not a result obligation, means that failure to achieve the desired result—preventing/ending genocide—does not constitute a basis for liability. The precise nature of the best efforts obligation to take all possible and reasonable measures within its power to prevent/end genocide may vary from state to state. This depends primarily on **a state's ability to effectively influence the behavior** of governments or individuals likely to commit genocide or already committing genocide.

Secondly, the **distance** to the -threatening- genocide and **the -political- ties** with the state/ persons responsible for the -threatening- genocide are relevant.

According to these criteria, a country like the Netherlands – relatively close, with good political ties to Israel and Israeli leaders, and with significant capacity to influence Israel's behavior through existing trade relations – has more extensive obligations to prevent or end the genocide against Palestinians than states that can exert less influence on Israel.

Furthermore, it is important to note that, according to the ICJ, in answering the question of whether a State has sufficiently complied with the obligation to use its best efforts under Article 1 of the Genocide Convention, it is **irrelevant** that a State claims—or could even prove—that even if it had taken all possible measures, it would never have been sufficient to prevent or end genocide. This is irrelevant because a. it concerns an obligation to use its best efforts, and b. a State party can never know whether the combined best efforts of the States parties could be successful.15

Although there has been a serious risk of genocide in Gaza for some time, and the Netherlands became aware of this by January 26, 2024, at the latest, it is not clear that the Netherlands has taken all possible and reasonable measures to prevent—and now end—this genocide. Insufficient due diligence has been exercised in this regard, partly in light of the fact that the Netherlands can be considered a state with a certain potential influence on Israel.

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[12] For the criminal complicity standard for international crimes, see Göran Sluiter, *The Effectiveness of the complicity standards in international crimes: the Van Anraat and Kouwenhoven cases,* Netherlands Journal of Criminal Law 2 (3), 138-14 (2021). For the complicity standard in international crimes in the area of state responsibility, see the 2024 dissertation by Joëlle Trampert, see https://dare.uva.nl/search?identifier=d5d8d396-216e-4a41-8471-68ebb6560f62.

[13] ICJ Bosnia v. Serbia, paras. 430-431. This was recently confirmed in ICJ Nicaragua v. Germany, para. 23 (2024).
[14] ICJ Bosnia v. Serbia, para. 430.
[15] ICJ Bosnia v. Serbia, para. 431.

Since the ICJ does not specify the measures to be taken as part of the obligation to make efforts, it is obvious that the Netherlands' failure to take serious steps and measures towards Israel to prevent genocide clearly falls short of complying with Article 1 of the Genocide Convention. The degree of violation of the obligation to make efforts will increase in severity and scale as the risk of genocide increases and as genocide, once initiated, sows more death and destruction on a daily basis.

Although the Dutch government has become somewhat more critical of Israel's actions in Gaza and is trying to develop initiatives within the EU framework to influence Israel's genocidal policy, it cannot be concealed that the obligation to make efforts has been violated for some time now – namely from January 26, 2024 – and the current, somewhat more critical and proactive policy, in our view, is far removed from what the ICJ requires of the Netherlands under Article I of the Genocide Convention. The call for an investigation into *whether* the EU Association Agreement is being violated and whether this constitutes grounds for further measures, given the number of authoritative authorities who have already conducted reliable and insightful fact-finding investigations and the rulings of the ICJ and ICC, demonstrates little understanding of the urgency of ending genocide and falls short of the ICJ's demand to do everything possible to prevent or end genocide.

We would like to note that the ICJ explicitly calls on individual states to fulfill their best efforts obligations, namely that they must independently do everything possible to prevent or end genocide. This is likely because there is, of course, the risk that states, in a situation of potential "liability for omission," might try to hide behind other countries that are also doing too little. However, the ICJ reverses this collective avoidance of best efforts: it is the independent and individual responsibility of each state to prevent genocide, so that it is precisely the combined efforts that can be most effective.

Other states demonstrate that things can be done differently. South Africa, for example, initiated proceedings against Israel at the ICJ because it believes—along with other countries—that its **own** obligation to prevent genocide necessitates this: *South Africa is acutely aware of the particular weight of responsibility in initiating proceedings against Israel for violations of the Genocide Convention. However, South Africa is also acutely aware of its own obligation—as a State party to the Genocide Convention—to prevent genocide*.[16] Several countries have joined South Africa in this process, including two EU states, Spain and Ireland.

8. Consequences for the Netherlands of the legal obligations to prevent genocide

The Netherlands is thus obligated to do more than it did. This stems not only from the Genocide Convention and the interim judgments of the ICJ in the genocide case against Israel, in which the ICJ consistently found that Israel was not complying with the orders already imposed and the situation was deteriorating; but also from the ICJ's Advisory Opinions of July 19, 2024, and – twenty years earlier – on July 9, 2004. In those opinions, the ICJ ruled that Israel's occupation is illegal, that Israel's policy qualifies as a violation of Article 3 of the Convention on Discrimination against Racial Segregation and Apartheid, and that all states are obligated to compel Israel to end it.

[16] ICJ, Application instituting proceedings and request for the indication of provisional measures, South Africa, para. 3, see Application instituting proceedings and Request for provisional measures.

We concur with the advice issued by the **Advisory Council on International Affairs** on **October 23, 2024 ,** which states that *"external, international pressure is necessary for de-escalation and conflict resolution, but that this pressure has largely been lacking to date."17* The AIV noted: *"A new course is necessary and urgent. The relatively low priority currently and in the recent past assigned to pursuing a sustainable solution to the Israeli-Palestinian conflict is, in the AIV's opinion, completely disproportionate to the human suffering and the material, international legal, and regional strategic interests associated with it."*

"Double standards in the enforcement of and compliance with international law appear to fuel social polarization in our own country and elsewhere in the world." [18]

To comply with its legal obligations, we advise the Netherlands to convict Israel of the most likely commission of genocide, crimes against humanity, and war crimes.
In addition, the Netherlands must announce further measures that can be effective in forcing Israel to urgently change course. This can be done in cooperation with other countries where possible, but as explained, the Netherlands also has an independent responsibility in this regard.

The Netherlands could **join the genocide case** brought by South Africa at the ICJ.

In addition, it should halt arms exports to Israel. In October 2024, the AIV recommended that bilateral **military cooperation and supplies to Israel** be urgently halted where they are used for acts that violate the laws of war. We add that all supplies that could contribute to Israel's continued violations must be halted. This also includes reviewing all licenses for the export and transit of (semi-)military goods.

In addition, the Netherlands should stop **importing weapons from Israel .** According to the NRC, Dutch purchases of Israeli weapons have exploded, and the Netherlands has become one of the most important customers for the Israeli arms industry, particularly since the outbreak of the Gaza War in 2023. This raises questions about how the Netherlands has fulfilled its obligation to prevent and end genocide. Per capita, Israel is by far the world's largest arms exporter. Stopping arms imports from Israel therefore seems like an effective message, as advocated by organizations like PAX, for example.

In October, the AIV already recommended that urgent **sanctions** be imposed on individuals and entities involved in the expansion and maintenance of illegal Israeli settlements. The AIV also emphasized the need for economic and other forms of cooperation with illegal Israeli settlements.

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[17] AIV, *Towards a new course for the Netherlands in the Israeli-Palestinian conflict* (23 October 2024), p.1, see Towards a new course for the Netherlands in the Israeli-Palestinian conflict | Publication | Advisory Council on International Affairs.

[18] AIV, *Towards a new course for the Netherlands in the Israeli-Palestinian conflict,* p. 3.

[19] See, for example, What trade in defense equipment does the Netherlands conduct with Israel? | de Volkskrant.

[20] Steven Derix, The Netherlands is buying more and more weapons from Israel - NRC

[21] See Trends in International Arms Transfers, 2024.

[22] See Demand a complete arms embargo against Israel - PAX. See also Full arms embargo now - Joop - BNNVARA.

to combat settlements, to exclude European companies and investors that contribute to the illegal settlement policy from tendering processes, and to refuse visas to settlers.23 In addition, the Netherlands should **actively investigate which sanctions and**

They can impose **trade restrictions** on the Israeli state and on companies that help perpetuate Israeli violations. Individuals and companies involved (or appearing to be involved) in international crimes committed in Gaza should be prosecuted here.

9. Final consideration: Positioning the Netherlands

The Netherlands, as guardian of the international legal order and in implementation of Article 90 of the Constitution – which states that the government should promote the development of the international legal order – – condemn Israel's flagrant violations of law and take seriously its obligations under the Genocide Convention and ICJ rulings to compel Israel to change course. If the Netherlands, as host country of the ICJ and the ICC, fails to do so and turns a blind eye, this confirms the double standards and Western hypocrisy that are causing considerable unrest in the world and in our country.
Above all, it is not only a legal but also a moral obligation to stop the genocide and ethnic cleansing of the Palestinians and to contribute effectively to ensuring that this people too can exercise their right to self-determination in safety and are protected from the structural injustice that has been inflicted on them for decades, as recognized by the ICJ.

[23] AIV, *Towards a new course for the Netherlands in the Israeli-Palestinian conflict* (23 October 2024).

APPENDIX 1

International Criminal Law in the Conflict between Israel and Hamas

Position paper by Dr. Marieke de Hoon, University of Amsterdam

Roundtable discussion on international humanitarian law, Standing Committee on Foreign Affairs, November 16, 2023

Introduction

There are a number of areas of law relevant to discussing the conflict between Israel and Hamas. These are in particular the legal basis for the use of force outside one's own territory *(ius ad bellum),* humanitarian law of war *(ius in bello),* law of occupation, human rights and international criminal law.

In their position papers, Prof. André Nollkaemper and Prof. Marten Zwanenburg have outlined the applicable legal frameworks of *jus ad bellum,* the law of war, and the law of occupation. In my contribution, I will elaborate on international criminal law and the possibilities for prosecution.

International criminal law is the legal field in which serious violations of *jus ad bellum,* the law of war, the law of occupation, and human rights are criminalized and provided frameworks for their prosecution. Furthermore, public international law imposes obligations on states to help prevent, investigate, prosecute, or extradite international crimes to states/institutions capable or willing to prosecute them.

International criminal law and the conflict between Israel and Hamas

Hamas's horrific actions of October 7, 2023, are clearly international crimes. There can be no ambiguity about this. Murdering, wounding, taking hostages, and holding them under inhumane conditions, mutilating corpses, and firing rockets into the Israeli civilian population all constitute war crimes and crimes against humanity, and possibly genocide if this pattern of violence is aimed at destroying a portion of the Jewish people. Using Palestinian civilians as human shields against Israeli attacks is also a war crime. Because it poses little ambiguity, I will not discuss it further in this short contribution, except to note that the ICC has jurisdiction over these crimes and has already initiated an investigation. Other countries, such as the Netherlands, can also prosecute Hamas fighters under universal jurisdiction if they enter their territory.

A more complex question is whether Israeli leaders also commit international crimes. The Rome Statute of the International Criminal Court (ICC) codifies the four core international crimes: war crimes, crimes against humanity, genocide, and aggression.

Most of the discussion revolves around **war crimes.** I distinguish three categories here. First, if it is proven that the ***supply of aid*** and other items essential to the survival of civilians was deliberately obstructed, this constitutes the war crime of starvation. Even if you exercise the right to self-defense, and regardless of Hamas's own violation of the laws of war, this method of warfare is a war crime.

Secondly, regarding ***combat actions ,*** it is more difficult to determine remotely whether war crimes are being committed, as it depends on the information Israel has about the military advantage and potential civilian casualties per operation. They must assess each attack to determine whether it constitutes a military objective and whether the expected military advantage is proportionate to the expected military advantage.

Necessity and proportionality of the attack. Even if a civilian object becomes a military target because Hamas uses it and civilians as human shields, Israel must still apply precautionary measures, necessity, and proportionality, and an attack is often illegal if it results in a disproportionate number of civilian casualties. Israel will have to explain these considerations in legal proceedings. It is noteworthy that it is difficult to imagine that the continuous bombing of densely populated areas and hospitals, the large size and scale of military operations, and the number of civilian casualties are always justified by the expected military benefits of eliminating Hamas (which in itself is a very difficult military objective to achieve), necessity, and proportionality, and that the Israeli military consistently takes the necessary precautionary measures to limit unnecessary civilian casualties. On the contrary, it appears here that certain military operations violate the laws of war to such an extent that they constitute war crimes.

Third, the ***forced transfer of civilians*** within Gaza or to Egypt (as described in leaked Israeli documents) also constitutes potential war crimes and ethnic cleansing. Warnings and calls for relocation only meet the requirements of the law of war if civilians can actually reach safety; not if they are sick or vulnerable in a hospital, if there are too many civilians and too little time, if the location to which they are being transferred is also being bombed, or if there is insufficient water or food.

The above-mentioned potential war crimes also qualify as **crimes against humanity** to the extent that they can be considered part of a widespread or systematic attack directed against (part of) the Palestinian civilian population.

Whether this also qualifies as **genocide** depends on whether these violations are committed with the intention of exterminating a portion of the Palestinian people. Various speeches by Israeli leaders containing dehumanizing language, humanitarian blockades that make living conditions extremely dire, and the number of attacks targeting civilian infrastructure and densely populated areas indicate that this may be a legitimate concern. This obligates other states, based on the obligation to prevent genocide as stipulated in Article 1 of the Genocide Convention, to urge Israel to refrain from pursuing this path.

Justice options

The principle of international law is that **countries should conduct their own investigations** into potential violations and prosecute any suspects. This scenario is unlikely in the short term for both Israel and Palestine.

The **ICC** can prosecute if a nation state is unable or unwilling to prosecute itself, provided it has jurisdiction. Although Israel is not a member state of the ICC, the ICC has jurisdiction over international crimes committed in the Palestinian territories since 2014, because the State of Palestine referred the situation to the ICC. This mandate is

There is no expiration date, meaning the ICC also has jurisdiction over current crimes. The ICC investigates crimes committed by both Hamas fighters and Israelis, focusing on those "most responsible": these are usually the leaders. However, the ICC can only prosecute if suspects have actually been apprehended and surrendered.

The role of other states

Other states can, under **universal jurisdiction,** prosecute suspects of international crimes if they are present on their own territory in the future. This is an important avenue for states to pursue, complementary to the ICC's capabilities, for which their own legal systems also **require sufficient resources and expertise.**

Other states can and should also **pressure both parties** to uphold international law, very explicitly including the obligation to prevent genocide where it threatens/occurs.

International law, as such, cannot do much on its own. It lacks the enforcement powers that states have. It does provide us with a **common language** to provide direction and interpretation in conflicts; to distinguish between what is and is not permissible; to chart a morally much clearer course instead of polarized, partisan positions : **establishing and enforcing**
basic humanitarian norms and international law.

If this is neglected, there is a colossal risk that such a spiral of injustice and violence will only lead to more disaster. The law provides us with this language and tells us what is and isn't permissible in war for a reason, because humanity has developed these rules over many centuries based on experiences with the consequences of escalating violence and unspeakable human suffering.
But the law needs political will and action to compel parties to adhere to it.

The Netherlands, as guardian of the international legal order, should actively promote this message, including in fulfilling the government's constitutionally enshrined obligation to promote the development of the international legal order.

APPENDIX 2
Qualification of Genocide in Gaza

This annex serves to further substantiate the qualification of the situation in Gaza as genocide. Case law has explained that to qualify as genocide, several requirements must be met. First, the crimes recognized under the Genocide Convention must be committed: a) killing; b) causing grievous bodily or mental harm; c) intentionally imposing conditions of life aimed at the physical destruction, in whole or in part, of the group; d) preventing births within the group; and e) forcibly transferring children of the group to another group. There is no doubt that the crimes referred to in a), b), and c) are being committed, as evidenced by the arrest warrants issued under the International Criminal Court for Prime Minister Netanyahu and former Defense Minister Gallant, judgments by the International Court of Justice, and authoritative reports by the UN and NGOs.

Second, these crimes must have been committed against a group protected under the Genocide Convention. In the South Africa v. Israel genocide case, the ICJ ruled that the Palestinians appear to be such a group (a definitive judgment can only be reached in the final stages of this years-long process) and that the Palestinians in Gaza constitute a substantial part of the Palestinian group. Moreover, more than 50,000 deaths are more than sufficient to qualify the violence as a substantial attack on that group, even though the law does not set a numerical limit to the commission of genocide and even a single murder can qualify as such.

The third, and often most difficult to prove, criterion is that the violence against the group must be committed with the specific intent to destroy that group, in whole or in part. Israeli leaders often say the violence is intended to destroy Hamas, but that is not the same as wanting to destroy the Palestinians. The question is whether, in addition to the goal of destroying Hamas, there is also the intent to destroy the Palestinians.

In the absence of a clearly stated or documented genocidal intent, as with the Nazis, this intent must be inferred from actions and statements. Courts and experts have identified several factors that distinguish genocidal intent from the destruction of certain members of the group (Hamas fighters) and from killing with ("merely") discriminatory intent. Beth van Schaack, former US Ambassador-at-large for Global Criminal Justice, has summarized these factors as follows, based on the judgments of international criminal tribunals:

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- The general context of the violence, including the scale of the atrocities, number of victims, the repetition of culpable acts, and gravity of the harm caused;
- The use of gratuitous violence that would be excessive in relation to military necessity or to accomplish objectives other than the destruction of the group;
- The targeting of all members of the group without distinction (to age, gender, involvement in opposition activities or ability to harm or threaten the perpetrators);
- The targeting of the group's leadership in order to weaken the group but also remove individuals who could raise the alarm or engage with the international community;

[24] ICJ, South Africa v. Israel, Interlocutory Judgment of 26 January 2024, para. 45.
[25] Beth van Schaack, *Determining the commission of genocide in Myanmar. Legal and policy considerations,* 17 Journal of International Criminal Justice (2019), 285-323.

- A history of other forms of discrimination or persecutory acts against members of the same protected group;
- The detrimental effect and long-term impact of the violence in terms of the future survival of the group;
- The methodical and systemic nature of the attacks;
- The implication of multiple levels of a chain of command in the attacks;
- The degree of planning and preparation behind the attacks;
- Attempts to cover up the crime and grant impunity to perpetrators;
- Attempts to bar humanitarian assistance to the victim group;
- The fact that members of other disfavored groups are spared or subjected to less destructive forms of violence;
- The utterance of derogatory language or the issuance of propaganda, targeted to members of the group;
- Potential motives of the perpetrators in terms of competition for resources or territory; • The existence of a political doctrine consistent with genocidal intent; and
- Attacks on cultural or religious property or symbols associated with the group.

If the above criteria are verified based on public sources, (almost) all of them are met in the situation in Gaza. This leads us to qualify the situation in Gaza as genocide.